

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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74-2635

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United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Claim for Compensation Under the
Longshoremen's and Harbor Workers' Compensation
Act made by

EDWARD POTENZA,

Claimant-Appellee,

—against—

UNITED TERMINALS, INC.

Employer-Appellant,

—and—

FEDERAL INSURANCE COMPANY,

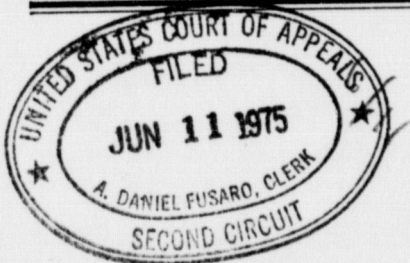
Carrier-Appellant,

DIRECTOR, OFFICE OF WORKERS' COMPENSA-
TION PROGRAMS, UNITED STATES DEPART-
MENT OF LABOR,

Party in Interest-Appellee.

On Review of the Decision of the Benefits Review
Board of the United States Department of Labor

APPELLANTS' REPLY BRIEF



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Statement

The following is submitted on behalf of the Appellants herein, in reply to Brief submitted by the Solicitor of Labor on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, said brief having been received by Appellants on June 2, 1975.

POINT I

The presumption under §20 of the Longshoremen's and Harbor Workers' Compensation Act are not applicable to the record in the present case.

At page seven, and eight, of the Director's brief it is urged that the presumptions provided in §20 of the Longshoremen's and Harbor Workers' Compensation Act have application to the present record.

We submit on its face, that this section has no application whatsoever to this record.

The presumptions under said §20 (33 USC 920) apply only in the absence of substantial evidence to the contrary. In the instant record the testimony of Dr. Harry Lane Robinson (149a-170a), pathologist selected by claimant's operating surgeon, the testimony of Dr. Harold Sage (170a-188a), the specialist who testified on behalf of Appellants herein, and the testimony of Dr. Tagliagambe (128a-148a), the first attending physician in this claim, not only constitutes substantial evidence to the contrary, but we submit establishes overwhelmingly the lack of relationship between the accident of October 2, 1972 and the aggravation of the pre-existing ameloblastoma of claimant's jaw.

By the very terms of the statute once substantial evidence is produced there is no application of the presumptions contained in the Act.

In connection with its argument regarding presumptions, and at Page 7 of the Director's brief, it is stated that Appellants base their appeal on testimony in the record which is believed to be more favorable to its cause.

The entire thrust of our appeal is that the testimony offered in support of the claim by Dr. Albanese (49a-118a), does not when examined in its entirety rise to the level of substantial evidence.

The requirement that substantial evidence be present to support a finding is a most necessary and equitable requirement. The mere utterance by a witness, such as in the instant case that the accident aggravated the pre-existing ameloblastoma, does not establish relationship per se. The direct testimony and cross examination of Dr. Albanese, who attempted to show that there was aggravation, we submit clearly establishes that although initially Dr. Albanese attempted to state that there was relationship that when his testimony is considered as a whole it becomes apparent that the statement is not supported by any fact or other evidence, to the contrary the testimony of the pathologist Dr. Robinson, Dr. Tagliagambe, the attending physician and Dr. Sage, appellant's specialist, show without contradiction that there was no evidence of aggravation. Although no one knows the cause of cancer per se the causes of aggravation can be ascertained, when they are present, without difficulty.

It is our contention that there was no evidence of aggravation in the instant case, that the operations performed by Dr. Albanese were performed because of the very basic nature of the pathology which existed long

prior to the accident and which required the very operative interventions at the time they were performed as soon as it was learned that claimant did have such a cancerous growth in his mandible.

Thus our position, that Dr. Albanese's testimony does not rise to the level of substantial evidence and therefore cannot support and does not support the conclusion of aggravation, is not, we contend, an objection based solely upon testimony which we believe to be "more favorable to its cause" as the solicitor attempts to urge. Rather it is asserted because from the point of view of rationality and fact that what Dr. Albanese has to say is not supported in any fashion.

Thus by legal measurement it does not rise to the level of substantial evidence. For that reason we ask this Court to reverse the rulings and awards made herein by the administrative law judge, as affirmed by the Benefits Review Board, which are based on finding of aggravation between the accident and the ameloblastoma.

Respectfully submitted,

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Appellants*

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Of Counsel

United Terminals Inc.,

Claimant-Appellant
Employer-Appellant

State of New York, County of New York, ss.:

Raymond J. Braddick, being duly sworn deposes and says that he is
agent for Linden & Gallagher Esqs. the attorney
for the above named Appellants herein. That he is over
21 years of age, is not a party to the action and resides at Levittown, New York

That on the 11th day of June, 1975, he served the within
Appellants Reply Brief

upon the attorneys for the parties and at the addresses as specified below

1. Edward Polenza Esq.
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238 Harrison Street
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2. William Kilberg Esq.
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Washington D.C.

by depositing 3 copies to each

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 11th.

day of June, 1975

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick